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(SHOW) PROCEEDINGS AND ORDERS DATE: 061687

CASE NBR 86-1-01096 ASY
SHORT TITLE Griffith, Bonnie S. DOCKETED: Dec 31 1986
VERSUS Illinois

Date	Proceedings and Orders
Dec 31 1986	Statement as to jurisdiction filed.
Feb 4 1987	DISTRIBUTED. February 20, 1987
Feb 17 1987	Response requested. (Due March 19, 1987 - NONE RECEIVED)
Apr 1 1987	REDISTRIBUTED. April 17, 1987
Apr 13 1987	Order extending time to file response to jurisdictional statement until April 20, 1987.
Apr 20 1987	Motion of appellee Illinois to dismiss or affirm filed.
May 6 1987	REDISTRIBUTED. May 21, 1987
May 6 1987	REDISTRIBUTED. May 21, 1987
May 26 1987	REDISTRIBUTED. May 28, 1987
Jun 1 1987	REDISTRIBUTED. June 4, 1987
Jun 8 1987	Appeal DISMISSED for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari DENIED. Dissenting opinion by Justice White. (Detached opinion.)

CONTINUE (

JURISDICTIONAL

STATEMENT

Supreme Court, U.S.
FILED
DEC 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

86 - 1096

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BONNIE S. GRIFFITH,
Appellant,

VS.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal from The Supreme Court of Illinois

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED FOR REVIEW

Does a person who is asked to submit him or herself to a chemical test after being arrested for driving under the influence have a constitutional right to consult with legal counsel before submitting to such test.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Grounds for Jurisdiction of Supreme Court	2
Statutes Involved	2
Statement of Case	4
Federal Question is Substantial	6
Conclusion	9

Appendices:

A. Order of the Illinois Supreme Court denying petition for leave to appeal	A-1
B. Opinion of the Appellate Court of Illinois, Fifth District	A-2
C. Order of the Illinois Supreme Court denying motion for direct appeal	A-8
D. Order of the Circuit Court for the Fourth Judicial Circuit, Marion County, Illinois	A-9
E. Notice of Appeal to the Supreme Court of the United States	A-19

TABLE OF AUTHORITIES

	Page
Cases:	
Heles v. State of South Dakota, 530 F.Supp 646 (1982) .	7
Nyflot v. Minnesota Commissioner of Public Safety, (85-636) 106 S.Ct. 586 (1985)	7
Sites v. Maryland, 330 Md. 702, 482 A.2d 192 (1984) ...	6
State v. Evergreen District Court, 100 WN2d 824 (1984)	7
Yerington v. Anchorage, Alaska App. 675 P2d 649, (1983)	7
Constitutional Provisions:	
Sixth Amendment to the United States Constitution	2, 6
Fourteenth Amendment to the United States Constitution	3, 6
Statutes:	
Illinois Revised Statutes, Chapter 38, Section 103-3	3
Illinois Revised Statutes, Chapter 38, Section 103-4	3

No.

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OCTOBER TERM, 1986

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PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

Appeal from The Supreme Court of Illinois

JURISDICTIONAL STATEMENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rules 12.3 and 15 of the Rules of the Supreme Court of the United States, appellant, Bonnie S. Griffith, files this statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction to review the order entered by the Supreme Court of Illinois in this case and should exercise such jurisdiction herein.

OPINIONS BELOW

The order of the Supreme Court of Illinois is unreported and is printed in Appendix A attached hereto, infra. The judgment of the Illinois Fifth District Appellate Court is reported as *Peo-*

ple v. Griffith, 143 Ill. App. 3d, 683, 493 N.E.2d, 413, 97 Ill.Dec. 750, and is printed in Appendix B attached hereto, infra. The docket Entry of Judgment of the Circuit Court for the Fourth Judicial Circuit, Marion County, Illinois, is printed in Appendix D attached hereto, intra.

JURISDICTION

This appeal arises from an order made and entered by the Illinois Supreme Court denying petition for leave to appeal the decision of the Appellate Court of the Illinois Fifth Judicial District which affirmed the Circuit Court of the Fourth Judicial Circuit, Marion County, Illinois, which made and entered a decision holding that a defendant did not have the right to counsel before deciding whether to submit to a chemical sobriety test under the sixth and fourteenth amendments of the United States Constitution.

The jurisdiction of this Court is invoked under the provisions of Title 28 United States Code, Section 1257, subparagraph 2. Notice of appeal was filed the 18th day of December, 1986, in the Illinois Supreme Court (a copy of which notice is set out in Appendix E hereto).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment of the United States Constitution, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

This case also involves the Fourteenth Amendment of the United States Constitution, which provides in part as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This case also involves Illinois Revised Statutes Chapter 38, Section 103-3, which provides as follows:

> Right to Communicate with attorney and family; transfers. (a) Persons who are arrested shall have the right to communicate with an attorney of their choice and a member of their family by making a reasonable number of telephone calls or in any other reasonable manner, such communication shall be permitted within a reasonable time after arrival of the first place of custody.

This case also involves Illinois Revised Statutes Chapter 38, Section 103-4, which provides as follows:

> Right to consult with an attorney. Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of immenent danger of escape, be allowed to consult with any licensed attorney at law of this State whom such person may desire to see or consult, alone and in private at the place of custody, as many times and for such period each time as is reasonable. When any such person is about to be moved beyond the limits of this state under any pretense whatever the person to be moved shall be entitled to a reasonable delay for the

purpose of obtaining counsel and of availing himself of the laws of this State for the security of personal liberty.

STATEMENT OF THE CASE

On July 9, 1984, the defendant was driving her car home at 9:00 p.m. in Marion County, Illinois, with a passenger. At that time she was arrested for driving under the influence. The reasonable cause for the stop of her vehicle was an alleged "wide turn" and crossing of the center line.

She produced her driver's license upon request and exited her vehicle when requested. The officer performed a horizontal gaze and nystagmus test (60% accurate) and advised the defendant she was under arrest for driving under the influence of alcohol. The officer transported her to the Salem Police Station, a fifteen minute journey by car from the location of the arrest, at which time she exited the squad car without assistance.

Upon arriving at the police station, the officer issued the defendant a citation for driving under the influence. He then read her the implied consent warning and asked her if she would submit to a breath test.

The officer did not warn the defendant she had the right to counsel when he asked her to submit to a breath test. Sometime later he read her Miranda rights, which he was sure she understood.

Although on the direct examination of the officer he testified that the defendant said she would not submit to a breath test, he admitted under cross-examination that at best the refusal was one of "silence."

The defendant testified that after the officer read her the implied consent warning, she asked him for advice and then asked to speak to an attorney. She was not allowed to speak to an attorney until after being read her Miranda rights.

The arresting officer filed a report with the circuit clerk stating that the defendant refused to submit to a breath test. The defendant filed motions attacking the constitutionality of Illinois statutes alleging that her six and fourteenth amendment rights to counsel were violated as well as Article I, Section 8, of the Illinois Constitution. Therefore, she could not be found to have refused to submit to a breath test.

The trial court denied petitioners motions attacking the constitutionality of Illinois DUI statutes stating, in a lengthy order as set forth in the appendix D hereto, that the petitioner had neither a federal or state constitutional right to counsel nor a state statutory right to counsel, prior to submitting to an implied consent test. The petitioner raised the same issues before the Illinois Fifth District Appellate Court in her Petition for leave to appeal and subsequent brief filed with the court. The appellate court affirmed the trial court on the basis that the Illinois legislature did not intend to continue the statutory right of counsel to implied consent testing. The court further held that neither the petitioner's sixth amendment or Illinois constitutional right of counsel were abridged reasoning that the implied consent hearing is not a "critical stage" to warrant right to counsel prior to deciding whether to complete the test. The court concluded by stating that the due process clause of the fourteenth amendment to the United States Constitution was not violated. The Supreme Court of Illinois denied a petition for leave to appeal on the 2nd day of October, 1986.

FEDERAL QUESTION IS SUBSTANTIAL

This appeal presents an important and substantial issue because it questions whether a person arrested for driving under the influence has a limited right to counsel when after being ticketed for driving under the influence, the officer asks if the arrestee will submit to a breath test.

The purpose of the Sixth and Fourteenth amendments are to ensure every person the right and protection of due process of law. This court must sustain this most important and fundamental right afforded by our United States constitution so that every person will have a fair trial.

Other courts have held that a defendant under very similar circumstances is assured the right to counsel before submitting to or refusing testing. The highest court in Maryland has held that a person apprehended for driving while intoxicated has a constitutional right under the fourteenth amendment to consult with counsel before submitting to the test. *Sites v. Maryland,* 330 Md. 702, 482 A.2d 192 (1984).

The court in *Sites* held in part as follows:

> "Considering all the circumstances, we think to unreasonably deny a requested right of access to counsel to a drunk driving suspect offends a sense of justice which impairs the fundamental fairness of the proceeding. We hold, therefore, that the due process clause of the Fourteenth Amendment, as well as Article 24 of the Maryland Declaration of Rights, requires that a person under detention for drunk driving must, on request, be permitted a reasonable opportunity to communicate with counsel before submitting to a chemical sobriety test, as long as such attempted communication will not substantially interfere with the timely and efficacious administration of the testing process." See *Sites,* 481 A2d at page 200.

In Illinois, the officer must observe the defendant arrestee for a continuous period of twenty (20) minutes prior to any administration of tests for alcohol. The defendant in this cause was arrested at a place which was a fifteen minute ride to the police station. There is no rational argument why defendant-arrestee should not be allowed to *attempt* to contact counsel during this time period. Such attempted communication would in no manner whatsoever substantially interfere or impair the efficacious administration of the testing process or defeat the purpose of the statute.

The United States District Court, Eighth Circuit in *Heles v. State of South Dakota,* 530 F.Supp. 646 (1982) recognized that a person arrested for DUI has a constitutional right to request to speak with an attorney prior to making the decision whether to submit to testing.

Moreover, in an Alaska Supreme Court decision, it was held that an arrestee for drunk driving has a right to contact an attorney prior to taking a breathalyzer test and was applied retroactively to the arrestee whose appeal was pending at the time of the decision. *Yerington v. Anchorage,* Alaska App. 675 P2d 649, (1983). The Supreme Court of Washington also held that when defendants are put in custody, police officers must inform them of the right to counsel prior to administering the breathalyzer test. *State v. Evergreen District Court,* 100 WN2d 824 (1984).

This same issue was raised in *Nyflot v. Minnesota Commissioner of Public Safety,* (85-636) 106 S.Ct. 586 (1985). In *Nyflot,* this court dismissed the appeal for want of a substantial federal question. However, the defendant in *Nyflot* failed to argue the applicability of the Fourteenth Amendment. Given these varying results, the question is now ripe for review.

When an arrestee is confronted with the decision to submit to a breathilizer test, he is faced with a critical and binding decision. The ticket has been issued and the defendant is under ar-

rest. The defendant is now placed in a most precarious position. If he refuses the test, said refusal may be introduced into evidence against him. If the defendant submits to the test, the results of the test may be introduced as evidence against him. Furthermore, he may not be aware of his right to have an independent test. It is this type of situation which due process is meant to protect. To allow submission to testing without a right to counsel would be denying a most substantive constitutional guaranty.

Due process demands that a person arrested for driving under the influence has a constitutional right to counsel prior to making a decision whether to submit to a breathilizer test. The law, with zealous regard for a defendant's rights, demands that he be accorded due process at every step of the proceedings against him.

There can be no doubt that the question presented to the Court is very substantial, affecting as it does, the single most important and fundamental right provided by our constitution, the right and protection of due process of law. One cannot conject any right that could be any more important to ensure the protection provided by the United States Constitution.

CONCLUSION

For the reasons stated above, appellant submits that this appeal brings before the court a substantial and important constitutional question which requires plenary consideration, with briefs on the merits and oral argument for its resolution.

Dated December 31, 1986.

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APPENDIX

APPENDIX A

ILLINOIS SUPREME COURT
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October 2, 1986

Mr. R. Edward Veltman, Jr.
Crain, Cooksey, Veltman & Pursell
623 East Broadway
Centralia, IL 62801

No. 63705 — People State of Illinois, respondent, v. Bonnie S. Griffith, petitioner. Leave to appeal, Appellate Court, Fifth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on October 24, 1986.

APPENDIX B

NO. 5-85-0256

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

People of the State of Illinois,
Plaintiff-Appellee,

vs.

Bonnie S. Griffith,
Defendant-Appellant.

Appeal from the Circuit Court of Marion County
Honorable Michael R. Weber, Judge Presiding.

JUSTICE WELCH delivered the opinion of the court:

Defendant Bonnie Griffith was charged with driving while under the influence of alcohol (Ill.Rev.Stat. 1983, ch. 95½, par. 11-501) and she requested an implied-consent hearing. The trial court found that the arresting officer had reasonable cause to arrest defendant for driving under the influence and that defendant refused the officer's offer to take a breath test. Defendant appeals. We affirm.

Defendant first argues that the circuit court's findings as stated above were contrary to the manifest weight of the evidence. Defendant suggests all the State's evidence was "tainted" after the arresting officer, Illinois State Police Sergeant Harold Blank, was "caught in a lie." Sergeant Blank first said defendant refused the breath test, then said her refusal was by silence. Impeachment does not render a witness' testimony nugatory. Impeachment goes only to its credibility and weight. (*Hectus v. Chicago Transit Auth.* (1954), 3 Ill.App.

2d 439, 446, 122 N.E.2d 587, 590.) The witnesses' credibility was for the trial court to decide. (*Schulenberg v. Signatrol, Inc.*, (1967), 37 Ill.2d 352, 356, 226 N.E.2d 624, 626.) We have examined all of the testimony including Sergeant Blank's and we find no cause to criticize the circuit court for believing the sergeant.

As to the sufficiency of the evidence in support of the findings of the circuit court, the standard of review is whether the findings were contrary to the manifest weight of the evidence. (*People v. Bafia* (1983), 112 Ill.App.3d 710, 712, 445 N.E.2d 878, 879.) Sergeant Blank testified that defendant failed the nystagmus test under the standards he learned at the State Police Academy at Springfield. He also testified that defendant's vehicle was outside its lane of traffic twice in a short distance and once almost struck a curb. Defendant admitted having one beer and two drinks of "V.O. and water." Sergeant Blank also testified defendant's eyes were bloodshot and she smelled of alcoholic beverage, and while this was contradicted, some smell was likely in view of what she admitted she drank. We find sufficient evidence of defendant's driving under the influence at the time of the stop. As to refusal, defendant admitted she was asked to take the test at least three times and never assented. According to defendant, the first time Sergeant Blank asked her to take a breath test, she asked him what he would advise if she were his daughter. He replied that he could not advise her. He asked her a second time; she asked for advice again and said she did not know what to do. He asked her a third time. Her reply: "I said, 'I would like to speak with an attorney for advice. I would like to know what to do,' and he said, 'I'm marking it down "refused",' and I told him that I did not refuse the test, that I would just like to speak to an attorney." She testified she did not say she would take the test. Sergeant Blank testified he asked her five or six times. We think the court was correct in interpreting her lack of assent as refusal. See generally *People v. Schuberth* (1983), 115 Ill.App.3d 302, 450 N.E.2d 459.

Defendant argues she had the right to counsel when asked to submit to a breath test, under sections 103-3 and 103-4 of the Code of Criminal Procedure of 1963. Section 103-3 states persons "who are arrested" shall have the right to communicate with an attorney of their choice by telephone or any other reasonable manner. (Ill.Rev.Stat. 1983, ch. 38, par. 103-3.) Section 103-4 states any person "committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense" shall be allowed to consult with an attorney. (Ill.Rev.Stat. 1983, ch. 38, par. 103-4.) The 1981 version of the implied consent statute provided the arrestee the right to consult with an attorney or other person by phone or in person within 90 minutes of being requested to take a breathalyzer test, but also that failure to consult counsel would not excuse or mitigate the effect of refusal to take the test. (Ill.Rev.Stat. 1981, ch. 95½, par. 11-501.1(a).) That version of the statute does not apply in this case. However, it indicated the legislature's intent that refusal to take the examination cannot be predicated or conditioned on failure to consult counsel. (*Village of Cary v. Jakubek* (1984), 121 Ill.App.3d 341, 344, 459 N.E.2d 651, 653.) Significantly, the legislature's next version of the implied consent statute did not even grant the arrestee an opportunity to consult with counsel before submitting to the test (Ill.Rev.Stat. 1982 Supp., ch. 95½, par. 11-501.1), and this is also true of the version under which defendant was tried (Ill.Rev.Stat. 1983, ch. 95½, par. 11-501.1).

What is the proper interpretation of the legislature's deletion of provisions regarding right to counsel from section 11-501.1? Defendant's argument suggests the legislature intended that sections 103-3 and 103-4 of the Code of Criminal Procedure of 1963 control an accused's right to counsel upon being requested to take a breath test. If this is what the legislature intended, then the accused has virtually the same right to consult an attorney prior to the test under the 1982 statute as under the 1981

version, despite the deletion of all references to right to counsel in section 11-501.1 after the 1981 version. We are skeptical as to this interpretation. An amendment to a statute is presumed to be intended to effect a change in the law. (*People ex rel. Gibson v. Cannon* (1976), 65 Ill.2d 366, 373, 357 N.E.2d 1180, 1183.) We do not intend to suggest that a person arrested for driving while under the influence of intoxicating liquor is not entitled to consult counsel pursuant to sections 103-3 and 103-4 of the Code of Criminal Procedure of 1963. However, in light of the substantial changes in the implied consent statute concerning pre-test right to consult counsel, we conclude the legislature did not intend to continue that statutory right prior to implied consent testing subsequent to the 1981 version of the implied consent statute.

Defendant argues she had a right to counsel prior to deciding whether to take the breath test under the sixth amendment to the United States Constitution and also under the Illinois constitution. (Ill. Const. 1970, art. I, §8.) Defendant argues that the post-arrest request that she submit to a breath test was a "critical confrontation" in the criminal prosecution against her at which she was entitled to presence of counsel. (See *United States v. Wade* (1977), 388 U.S. 218, 226-27, 18 L.Ed.2d 1149, 1157, 87 S.Ct. 1926.) However, what is in question in this appeal is not the charge against defendant of driving while under the influence of alcohol, but rather whether the findings of the trial court after the implied consent hearing were correct. In *People v. Golden* (1983), 117 Ill.App.3d 150, 453 N.E.2d 15, this court rejected two indigent defendants' contentions that they were entitled to representation by court-appointed counsel at implied consent hearings, reasoning that such a hearing was not a "critical stage" in the criminal prosecution but rather a separate and distinct proceeding which might even be held subsequent to disposition of the criminal charge and might result in suspension of an accused's driver's license notwithstanding dismissal of the charge of driving under the influence.

Suspension of the driver's license is an administrative function; it is not part of the punishment for driving under the influence but merely a regulatory measure (*People v. Finley* (1974), 21 Ill.App.3d 335, 340, 315 N.E.2d 229, 232.) It being well-settled that the implied consent hearing is not a "critical stage" in the underlying prosecution for driving under the influence, we must conclude that the decision whether to complete the test is also not a "critical state," as its relationship to the criminal prosecution is even more attenuated. We must reject defendant's arguments in support of a sixth amendment or Illinois constitutional right to counsel prior to deciding whether to complete the test.

Defendant contends the due process clause of the fourteenth amendment to the United States Constitution required that she be permitted to call a lawyer before deciding whether to take the test. The due process clause applies to deprivation of a driver's license. (*Mackey v. Montrym* (1979), 443 U.S. 1, 10, 61 L.Ed.2d 321, 329, 99 S.Ct. 2612, ____.) However, we think the pre-suspension hearing in this case was an adequate and timely opportunity for defendant "to tell [her] side of the story * * *, to obtain correction of clerical errors, and to seek prompt resolution of any factual disputes * * * as to the accuracy of the officer's report of refusal." (443 U.S. 1, 15, 61 L.Ed.2d 321, 333, 99 S.Ct. 2612, 2620.) We cannot conclude the procedure adopted in this case was violative of the due process clause.

For the foregoing reasons, the order of the circuit court of Marion County is affirmed.

AFFIRMED.

KARNS, J., CONCURRING.

NO. 5-85-0256

IN THE
APPELLATE COURT OF ILLINOIS
FIFTH DISTRICT

People of the State of Illinois,
Plaintiff-Appellee,

vs.

Bonnie S. Griffith,
Defendant-Appellant.

Appeal from the Circuit Court of Marion County.
Honorable Michael R. Weber, Judge Presiding.

JUSTICE HARRISON, specially concurring.

I concur in the result reached by the majority for the reasons set forth in *Village of Cary v. Jakubek* (1984), 121 Ill.App.3d 341, 459 N.E.2d 651.

APPENDIX C

STATE OF ILLINOIS
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April 24, 1985

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THE COURT HAS TODAY ENTERED THE FOLLOWING ORDER IN THE CASE OF:

No. 61713 — People State of Illinois, appellee, v. Bonnie S. Griffith, appellant.

The motion by appellant for direct appeal is *denied*.

JH:sdl

cc: AG/Crim
SA/Marion

APPENDIX D

IN THE CIRCUIT COURT FOR THE FOURTH JUDICIAL CIRCUIT
MARION COUNTY; ILLINOIS

84-TR-5427, 84-TR-5427, 82-TR-3434

People of the State of Illinois,

vs.

Bonnie S. Griffith

ORDER

The defendant in this cause has filed various motions in this cause attacking the constitutionality of the Illinois Implied Consent Law, Ill. Rev. Stat. Ch. 95½, §11-501.1; however, at the breath refusal hearing held in this case the defendant limited her motions and arguments to the issue of whether the defendant was entitled to consult with an attorney prior to implied consent testing. Defendant contends that the State's failure to advise her of her right to consult with counsel prior to requesting her to submit to a Breathalyzer Test is a violation of her Sixth Amendment right to counsel as well as her Fourteenth Amendment Due Process right to counsel afforded by the United States Constitution. Also, defendant contends in the instant case her statutory right to counsel afforded by Ill. Rev. Stat. Ch. 38, §§ 103-3 and 103-4 were violated. Defendant argues that as a result of the aforementioned violations of her rights by the State in this case, this Court should suppress defendant's failure to submit to implied consent testing from both the implied consent hearing as well as from the prosecution of the underlying charge of driving while under the influence of alcohol.

Inasmuch as the issues presented have not been addressed by prior Appellate or Supreme Court decisions of this State, a review of certain statutory provisions as well as prior Court decisions of this and other states, as well as Federal decisions, is mandated.

Pursuant to Ill. Rev. Stat. Ch. 95½, § 11-501.1, a defendant must be arrested, "as evidenced by the issuance of a Uniform Traffic Ticket", for the offense of driving while under the influence of alcohol or drugs, as a prerequisite for the submission of that defendant to the Breathalyzer or other tests provided in Ill. Rev. Stat. Ch. 95½ § 11-501.2. Additionally, Ill. Rev. Stat. Ch. 38, § 111-2(b) provides that all prosecutions, other than felonies, shall be commenced by indictment, information or complaint. Furthermore, Ill. Rev. Stat. Ch. 38 § 111-3(b) provides that the form of complaint in traffic related cases may be the Uniform Traffic Ticket. Finally, it should be noted that Ill. S. Ct. Rule 526(c) and (d) provides that bail for persons charged with driving under the influence of alcohol or drugs is $3000.00 or $1000.00 plus a current Illinois driver's license.

The State argues that the implied consent testing is civil in nature and therefore does not afford to a defendant a Constitutional or Statuatory right to counsel. This Court is mindful of the Illinois Appellate Court's opinion in *People v. Golden,* 117 Ill. App. 3d 150 (5th Dist. 1983) that a breath refusal hearing is civil in nature and does not give rise to Sixth Amendment protections. This Court is of the opinion, however, that said opinion in *Golden* is not in conflict with that portion of the well reasoned opinion of *Heles v. South Dakota,* 530 F. Supp. 646 (1982), dealing with the civil *vs.* criminal nature of implied consent *testing*. In *Heles,* while recognizing that the license revocation proceeding is civil proceeding initiated in such cases until there is a refusal to submit to the implied consent testing. Prior to a refusal, the Court concluded, the proceedings are entirely criminal in nature inasmuch as the defendant is in custody pursuant to an arrest on a criminal charge. This Court concurs with *Heles* and finds that implied consent *testing* is a criminal proceeding to be governed by the procedures and protections of the criminal law.

The Sixth Amendment right to counsel has been addressed in *Kirby v. Illinois,* 406 U.S. 682 (1972). In *Kirby,* the Court held

that the Sixth Amendment right to counsel does not attach until after the initiation of an adversarial criminal proceeding by way of indictment, information, or other formal charge. Defendant contends that under the Illinois implied consent statute, a driver must be placed under arrest and be issued a Uniform Traffic Ticket before being requested to submit to a test, thus bringing the driver within the ambit of *Kirby*. The Appellate Court of this State has held, however, that the issuance of a Uniform Traffic Ticket is directory and not mandatory to the request to submit to implied consent testing. *People v. Ellerbusch,* 118 Ill. App. 3d 500 (4th Dist. 1983) and *People v. Wierman,* 107 Ill. App. 3d 7 (4th Dist. 1982). The *Wierman* Court, agreeing with the Pennsylvania Court in *Commonwealth v. Ebert* (1977), 31 Pa. Commw. Ct. 82, 375 A.2d 837, stated at page 11

> "The Court held that the legislature did not intend to require a formal charge prior to the request to submit to a breath test. The purpose of the implied consent law was to get intoxicated drivers off the highways. Since 'evidence' of intoxicants dissiptates rapidly, the Court reasoned, requiring a formal charge before the request to submit to the breath test would frustrate the purpose of the statute. The Court interpreted 'formally charged' as requiring that the driver be informed that he is under arrest before the request to submit to the breath test is made.
>
> "We agree with the reasoning of the Court in *Ebert.*"

Defendant has also cited *Berkemer v. McCarty,* ____ U.S. ____, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984). The *Berkemer* case stands for the proposition that while the roadside questioning of a motorist stopped pursuant to a routine traffic stop does not constitute a custodial interrogation giving rise to *Miranda* type rights or warnings, if a motorist is thereafter subjected to treatment that renders him or her "in custody" he or she is entitled to the full protections of *Miranda,* including the right to counsel. Defendant argues that in the instant case she was ar-

rested, charged by the issuance of a ticket, taken into custody and held on a predetermined cash bond. Under *Berkemer* the defendant claims she was entitled to the "full panoply of protections prescribed by *Miranda*." This Court disagrees with respect to the issues presented in this case. *Berkemer* is a case involving custodial interrogation. The instant case involves the gathering of nontestimonial evidence. The United States Supreme Court has stated in *Schmerber v. California,* 384 U.S. 757 (1966) that the Fifth Amendment privilege protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature, and that the withdrawal of a blood sample in that case, and a breath sample in the instant case, and the use of the analysis of such samples so withdrawn in future court proceedings did not involve compulsion to testify or provide evidence.

Defendant next contends that the "collection of evidence" for a criminal prosecution through implied consent testing makes the administration of such a test a "critical stage" during which the defendant is entitled to a Sixth Amendment right to counsel. Defendant argues the case of *United States v. Wade,* 388 U.S. 218 (1967) to the extent that the Sixth Amendment guarantees the accused that she "not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to stand trial". The *Wade* Court concluded that there are certain "critical stages" at which the accused has the right to the presence of counsel. This Court's analysis of *Wade,* however, indicates that implied consent testing is not a "critical stage" in the prosecution of defendant. The implied consent tests defined by Ill. Rev. Stat. Ch. 95½ § 11-501.2 are scientific tests and can be compared to fingerprint, blood, hair and other analysis. Citing from *Wade* at page 227,

> "Knowledge of the techniques of science and technology is sufficiently available, and the variables in techniques few enough, that the accused has the opportunity for a meaningful confrontation of the Government's case at trial through the ordinary process of cross-examination of the Government's expert witnesses and the presentation of the evidence of his own experts. The denial of a right to have his counsel present at such analysis does not therefore violate the Sixth Amendment; they are not critical stages since there is minimal risk that his counsel's absence at such stages might derogate his right to a fair trial."

This Court therefore concludes that a defendant does not have a Sixth Amendment right to counsel prior to being requested to submit to an implied consent test pursuant to Ill. Rev. Stat. Ch. 95½, § 11-501.1.

Aside from the Sixth Amendment right to counsel, the due process clause of the Fourteenth Amendment is an independent source of a right to counsel where fairness dictates it to protect the concept of ordered liberty. *Goldberg v. Kelly,* 397 U.S. 254 (1970). A balancing test must be analyzed, weighing the interest of the individual to be protected against the interests of the public.

This Court recognizes the true purpose of the Illinois implied consent law as ridding the highways of this State of the imminent danger drunk drivers present to the general public. As stated above, this protection afforded to the public must be weighed against the individuals right to counsel during an evidence gathering proceeding by the State for the prosecution of the defendant on criminal charges. The right to counsel afforded to the individual should not thwart the legislative intent underlying the Implied consent statute.

The defendant argues that the time immediately following an arrest for driving under the influence when a defendant has to make a decision whether to submit to an implied consent test, arrange for further testing and observation of the defendant's demeanor is a time where fairness dictates a defendant should

be permitted to consult with counsel provided such consultation will not interfere with the implied consent testing. "[T]he choice to submit or refuse to take to blood-alcohol test [in drunk driving cases] will not be an easy or pleasant one for a suspect to make." *South Dakota v. Neville,* 459 U.S. 553 (1983).

The defendant also argues that the Breathalyzer Test, the test the defendant refused to submit to in the instant case, does not need to be administered immediately upon the arrest of a defendant to determine whether the defendant was driving under the influence of alcohol. The Department of Public Health's *Standards For The Operation Of Approved Breath Analysis Instruments* provides in part at Rule 3.01 (a) for "[c]ontinuous observation of the subject for at least (20) minutes prior to collection of the breath specimen..." "Allowing the arrested driver a reasonable opportunity to use the telephone to contact an attorney during this period would not delay the administration of the test, affect the accuracy of the test, nor defeat the purpose of the implied consent law." *Heles supra* at 653.

This Court cannot agree with the defendant's arguments that a driver has a Fourteenth Amendment right to counsel prior to submitting to an implied consent test. A driver has no constitutional right to refuse to submit to a Breathalyzer test. *Village of Cary v. Jakubek,* 121 Ill. App. 3d 341 (2nd Dist. 1984). This Court further stated in *Cary* at page 344

> "Furthermore, section 11-501.1 does not require that the arresting officer inform the defendant that his right to counsel in criminal cases is inapplicable to a situation involving the implied consent statute."

The nature of the implied consent statute is that a driver who exercises his or her privilege to drive upon the public highways of this State consents to submit to take the tests defined in Ill. Rev. Stat. Ch 95½, § 11-501.2. The Standards of the Department of Public Health provide for a minimum of only twenty minutes of observation by the arresting officer of the arrested

driver prior to the administering of the Breathalyzer test. Generally, most of this twenty minute period is consumed during the stop, the arrest, the transportation of the obligations with respect to the test, and the setting up of the apparatus to administer the test. To allow the driver attempts to contact an attorney would unduly consume the time of law enforcement personnel who would oterwise be available to patrol the public highways and more fully implement the implied consent statute's purpose of ridding the highways of drunk drivers.

Furthermore, as stated above in the analysis of *Wade, supra,* the implied consent tests, including the Breathalyzer test, utilize scientific techniques widely known throughout the technologic community. The operator of the Breathalyzer must be trained and qualified to operate the machine. *Rule 4 of above cited Standards.* Defendant's due process rights can be effectively protected through cross-examination of the operator and the State's expert who may be called at the trial and by the testimony of the Defendant's expert presented at the trial concerning the accuracy of the machine, the procedures followed, and the expertise of the operator.

Inasmuch as a defendant has no right to refuse to submit to an implied consent test, and such tests are generally accepted within the scientific community and licensed operators are mandated, and that defendant can challenge at trial through the use of experts the particular accuracy of test, the apparatus, the acceptance of the test within the scientific community, as well as the operator's expertise, the defendant is not denied due process by not being afforded an opportunity to contact an attorney prior to deciding whether to submit to the test.

Having concluded that Defendant has no Sixth or Fourteenth Amendment right to counsel in this cause and following *People v. Rolfingsmeyer,* 101 Ill. 2d 137 (1984), this Court further concludes the Illinois Constitution does not provide Defendant a right to counsel prior to submitting to an implied consent test.

Defendant next and finally contends that Ill. Rev. Stat. Ch. 38, §§ 103-3 and 103-4 give the defendant a statutory right to consult with counsel prior to the submission to implied consent testing. A reading of these two statutory provisions does not reveal any limitation on the scope or purpose for which a defendant may contact an attorney; and defendant further points out inasmuch as § 103-4 provides that the defendant may consult his or her attorney "alone and in private", said statute is intended to provide the defendant with the legal advise and counsel of his or her attorney at the earliest feasible opportunity following deprivation of a defendant's liberty. Defendant further argues that placing this in the context of the driving while under the influence of alcohol arrest, the arrested driver should be provided an opportunity to consult with counsel, even if only via telephone, over whether to submit to a Breathalyzer test. Once again this Court cannot agree with the defendant's conclusions.

While the present implied consent law is silent on the issue of defendant's "right to counsel", this Court will not conclude that the above cited sections of the criminal code govern. The intent of the legislature must be examined. This Court believes that intent can be shown by quoting at length from the *Cary* opinion *supra* at page 344.

> "We note that section 11-501.1(a)(3) of the Illinois Vehicle Code (Ill. Rev. Stat. 1981, Ch 95½, par 11-501.1(a)(3)), as amended by Public Act 82-221, stated that the arrested person may consult an attorney within 90 minutes of being requested to take a breathalyzer test. That same statute, however, expressly provided that the '[f]ailure to consult counsel shall not excuse or mitigate the effect of the refusal to take or complete the test' (Ill. Rev. Stat. 1981, ch. 95½, para. 11-501.1(a)(9).) That version of the statute does not control this case. Nevertheless, it indicated the legislature's intent that a refusal to take the examination cannot be predicated or conditioned upon the failure to consult counsel. Significantly, the current statute (Ill. Rev. Stat., 1982 Supp., ch 95½, para. 11-501.1), under which defendant was tried, does not even grant the arrestee an opportunity to consult with counsel before submitting to the test."

From this above cited passage, this Court concludes that the amendments to § 11-501.1 stated in that passage show a clear legislative intent that a defendant not be provided a statuatory right to consult with counsel prior to submitting to a Breathalyzer test.

This Court does therefore find that under the Illinois implied consent law an arrested driver does not have a statuatory right to counsel prior to deciding whether to submit to implied consent testing.

In this case there was contradictory testimony concerning whether and when the defendant requested to contact her attorney and the officer's response to her requests. This Court finds the contradictions not to be of consequence in deciding this case. As found above a defendant has no right to counsel, and as found in *Cary supra,* an arresting officer is not required to inform the defendant that her right to counsel in criminal cases does not apply to implied consent testing.

For the foregoing reasons, defendant Bonnie S. Griffith's Motions requesting this Court to suppress defendant's failure to submit to implied consent testing from both the implied consent hearing as well as from the prosecution of the underlying charge of driving while under the influence of alcohol are denied; and all findings of this Court at the Breath Refusal Hearing held in this cause are confirmed.

On defendant's request, this Court does stay the Clerk of this Court from notifying the Secretary of State of this Court's findings at the Breath Refusal Hearing pending appeal.

Entered this 17th day of January A.D., 1985.

/s/ Michael R. Weber
Circuit Judge

ADDENDUM TO ORDER

Subsequent to the drafting of the above Order, Defendant submitted *People v. Greenspon,* 473 N.E. 2d 331 (1st Dist. 1985), contending that inasmuch as *Miranda* rights were given to the defendant by the arresting officer prior to the request to submit to a breathalyzer test and further inasmuch as the Court concluded that "... proper admonishments,..." were provided, that the case stands for the proposition that *Miranda* is required to constitute proper admonishments in breathalyzer cases. With this, this Court cannot agree. In the lengthy Order preceding, this Court has concluded that the Defendant has neither a Federal or State constitutional right to counsel, nor a State statuatory right to counsel, prior to submitting to an implied consent test. While giving *Miranda* in addition to the implied consent warnings of Ill. Rev. Stat. Ch 95½ § 11-501.1(c) constitutes proper admonishments, the lack of *Miranda* does not render the implied consent warnings of Ill. Rev. Stat. Ch 95½ § 11-501.1(c) improper. *Village of Cary v. Jakubek,* 121 Ill.App. 3d 341 (2nd Dist. 1984). The findings and rulings of the foregoing Order are hereby confirmed.

Dated this 8th day of April A.D. 1985

/s/ Michael R. Weber
Circuit Judge

APPENDIX E

No. 63705

IN THE
SUPREME COURT OF ILLINOIS
SPRINGFIELD, ILLINOIS

People of the State of Illinois,
Plaintiff/Appellee,

vs.

Bonnie S. Griffith,
Defendant/Appellant.

Petition for Leave to Appeal from the Appellate Court of Illinois, Fifth District
No. 5-85-0256

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Bonnie S. Griffith, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Illinois Supreme Court, entered the 2nd day of October, 1986, denying a petition for leave to appeal the judgment of the Appellate Court of the Illinois Fifth Judicial District which affirmed the Circuit Court of the Fourth Judicial Circuit, Marion County, Illinois, ruling that denying a defendant right to counsel before deciding whether to submit to a chemical sobriety test was not violative of right to counsel under the sixth amendment or fourteenth amendment to the United States Constitution.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagraph 2.

DATED: December 18, 1986.

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CERTIFICATE OF SERVICE

I do hereby certify that I have mailed to the persons listed below the appropriate number of copies of the foregoing APPEAL, in compliance with 28 U.S.C.A. Rule 28(5)(b), by placing said copy in an envelope, legibly addressed, securely sealed and sufficiently stamped and depositing same in the United States Mail at Centralia, Illinois at 5 o'clock P.M., all in compliance with said Rule on this date.

DATED this 18th day of December, 1986.

R. Edward Veltman, Jr.
Crain, Cooksey & Veltman, Ltd.

Honorable Juleann Hornyak
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Clerk of the Court
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MOTION

Supreme Court, U.S.
FILED
APR 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BONNIE S. GRIFFITH,

Appellant,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM

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Printed by Authority of the State of Illinois (P.O. 33641—55—4-29-87)

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court has jurisdiction over this direct appeal where appellant has failed to indicate precisely what state statute violates the federal constitution.

2. Whether the petitioner in an implied consent proceeding has a sixth amendment right to counsel.

3. Whether this Court should expand the due process protection afforded in *Mackey v. Montrym*, 443 U.S. 1 (1979).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
MOTION TO DISMISS OR AFFIRM	1
STATEMENT OF THE CASE	1
REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE JUDGMENT BELOW:	
THIS COURT LACKS JURISDICTION TO HEAR THIS CAUSE BECAUSE APPELLANT HAS FAILED TO INDICATE WHICH STATE STATUTE VIOLATES FEDERAL CONSTITUTIONAL PRINCIPLES. IN ADDITION, APPELLANT HAS NOT STATED A SUBSTANTIAL QUESTION. APPELLANT HAD NO SIXTH AMENDMENT RIGHT TO BE ADVISED OF HER RIGHT TO COUNSEL BECAUSE AN IMPLIED CONSENT HEARING IS NOT A CRITICAL STAGE IN THE CRIMINAL PROCEEDINGS AGAINST HER FOR DRIVING UNDER THE INFLUENCE	2
CONCLUSION	4

TABLE OF AUTHORITIES

CASES	PAGE
Koss v. Slater, ___ Ill. 2d ___ (No. 63294, 4-2-87) (Slip Op. at 6-7)	3
Mackey v. Montrym, 443 U.S. 1 (1979)	3
People v. Frye, 113 Ill. App. 3d 853, 447 N.E.2d 1065 (3d Dist. 1973)	3
People v. Golden, 117 Ill. App. 3d 150, 453 N.E.2d 15 (5th Dist. 1983)	3
People v. Malloy, 76 Ill. 2d 513, 395 N.E.2d 381 (1979)	3
CONSTITUTIONAL PROVISIONS AND STATUTES	
U.S. Const., amends VI, XIV	2
28 U.S.C. 1257(2)	3
Ill. Rev. Stat., 1983, ch. 95½, sec. 11-501	2
Ill. Rev. Stat., 1983, ch. 95½, sec. 11-501.1	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BONNIE S. GRIFFITH,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal from the Supreme Court of Illinois

MOTION TO DISMISS OR AFFIRM

The People of the State of Illinois, appellee in this cause, moves this Court to dismiss the appeal or, in the alternative, to affirm the judgment of the Illinois Supreme Court, for the following reasons:

STATEMENT OF THE CASE

Bonnie S. Griffith ("appellant") was arrested and charged with driving under the influence of alcohol. (*Ill. Rev. Stat.*, 1983, ch. 95½, sec. 11-501). Appellant refused a breathalyzer test and subsequently requested an implied consent hearing.

Following the hearing, the trial court determined that the police officer had reasonable cause to arrest appellant for driving under the influence. The court further found that petitioner had refused the breathalyzer test.

The Illinois Appellate Court affirmed the lower court's judgment and the Illinois Supreme Court denied leave to appeal.

REASONS FOR DISMISSING THE APPEAL OR AFFIRMING THE JUDGMENT BELOW

THIS COURT LACKS JURISDICTION TO HEAR THIS CAUSE BECAUSE APPELLANT HAS FAILED TO INDICATE WHICH STATE STATUTE VIOLATES FEDERAL CONSTITUTIONAL PRINCIPLES. IN ADDITION, APPELLANT HAS NOT STATED A SUBSTANTIAL QUESTION. APPELLANT HAD NO SIXTH AMENDMENT RIGHT TO BE ADVISED OF HER RIGHT TO COUNSEL BECAUSE AN IMPLIED CONSENT HEARING IS NOT A CRITICAL STAGE IN THE CRIMINAL PROCEEDINGS AGAINST HER FOR DRIVING UNDER THE INFLUENCE.

Appellant argues that this case presents a substantial federal question because, following her arrest for driving under the influence (*Ill. Rev. Stat.*, 1983, ch. 95½, sec. 11-501), she had a sixth and fourteenth amendment right to consult with counsel prior to deciding whether or not to take a breathalyzer test. In addition, appellant contends that the absence of an admonishment concerning the right to counsel deprived her of due process of law. U.S. Const., amends. VI, XIV. (App. Br. at 6) Appellee contends that appellant has failed to present a substantial federal question. Appellant's initial point fails because the sixth amendment right to counsel is inapplicable to this administrative

proceeding. Appellant's alternative argument fails because she received a full and fair implied consent hearing.

Initially, this Court lacks jurisdiction to hear this cause. Appellant seeks to invoke this Court's jurisdiction under 28 U.S.C. 1257(2), which allows a direct appeal when a state statute is challenged as "repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of validity." However, petitioner has failed to indicate precisely which Illinois statute violates federal constitutional principles. Therefore, jurisdiction is lacking.

It is also important to note that the present case is an appeal from an implied consent hearing (*Ill. Rev. Stat.*, 1983, ch. 95½, sec. 11-501.1), not from a criminal conviction. Obviously, the sixth amendment right to counsel attaches at all "critical stages" of criminal proceedings. However, an Illinois implied consent hearing is civil rather than criminal in nature. *People v. Malloy*, 76 Ill. 2d 513, 395 N.E.2d 381 (1979); *People v. Frye*, 113 Ill. App. 3d 853, 447 N.E.2d 1065 (3d Dist. 1973); *People v. Golden*, 117 Ill. App. 3d 150, 453 N.E.2d 15 (5th Dist. 1983). Therefore, the hearing is not a "critical stage" of the proceedings. *Koss v. Slater*, ____ Ill. 2d ____ (No. 63294, 4-2-87) (Slip Op. at 6-7) For these reasons, appellant had no sixth amendment right to counsel prior to making the breathalyzer decision.

Appellant next argues that principles of due process afforded her the right to counsel. However, because the present proceeding included only the question of whether appellant's driver's license should be revoked, she was entitled to the due process protection explained by this Court in *Mackey v. Montrym*, 443 U.S. 1 (1979). Here, appellant received such protection at a full and fair hearing where appellant had the opportunity to test the cor-

rectness of the police officer's observations. Appellant has failed to demonstrate why the due process clause requires more.

CONCLUSION

For these reasons, appellee requests this Court to dismiss this cause for failure to state a substantial federal question.

Respectfully submitted,

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OPINION

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

SUPREME COURT OF THE UNITED STATES

BONNIE S. GRIFFITH *v.* ILLINOIS

ON APPEAL FROM THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

No. 86-1096. Decided June 8, 1987

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

JUSTICE WHITE, dissenting.

I agree with the majority that this case is not a proper appeal but, for the reason stated in my dissent from denial of certiorari in *Nyflot* v. *Minnesota Commissioner of Public Safety*, —— U. S. —— (1985), I would grant certiorari.